

APPENDIX FOR PETITION FOR CERTIORARI IN THE UNITED STATES SUPREME COURT

D. H. Overmyer Co., Inc. v. The Frick Company

Pertinent Docket Entries

C. P. Appearance Docket No. 408

Cause No. 204697

Pg. No.'s 197 A-4 A-12

Attorneys:

Shumaker, Loop & Kendrick—FRICK COMPANY, a corporation,
Plaintiff-Appellee

Bugbee & Conkle—D. H. OVERMYER CO., INC., a corporation,
Defendants-Appellants

1968

July 12—Petition, Warrant of Attorney, Military Affidavit, Answer and praecipe filed.

July 12—Judgment as stated above and for costs. Jour. 392-78.

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc. 201 East 42nd Street, New York, New York, 10017. Certified Number 059724. Return receipt requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., a Kentucky Corp. 201 East 42nd Street, New York, New York 10017. Certified # 059723. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation, System, 1036 Union Building, Cleveland, Ohio 44115. Certified # 059725. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation, System, 1700 Kentucky Home Life Bldg., Louisville, Kentucky 40202. Certified # 059726. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Inc., 302 South Byrne Road, Toledo, Ohio 43615. Certified # 059727. Return receipt requested. Postage 50¢

July 22—Motion of defendants for New Trial, filed.

July 22—Motion of defendants to Stay Execution, filed.

July 22—Affidavit, filed.

August 6—Motion of defendant to Vacate Judgment Rendered on Warrant of Attorney, filed.

Aug. 6—Answer of defendants and Cross petition of defendant D. H. Overmyer Co. an Ohio Corporation, filed.

Nov. 26—Motions to Stay Execution is overruled, for a new trial overruled. Demurrer of defendants to plaintiff's cause of action overruled. Jour. 401-154.

Dec. 4—Notice of Appeal and Praecipe filed. CA 6552

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

FRICK COMPANY, a corporation, 231 West Main Street,
Waynesboro, Pennsylvania 17268, *Plaintiff*,

v.

D. H. OVERMYER Co., INC., a corporation, 302 South Byrne
Road, Toledo, Ohio 43615,

and

D. H. OVERMYER Co., INC., a corporation, 1700 Kentucky
Home Life Building, Louisville, Kentucky 40202,
Defendants.

Petition

1. Plaintiff is a Pennsylvania corporation qualified in accordance with the provisions of Ohio Revised Code Chapter 1703 to do business in Ohio.

2. D. H. Overmyer Co., Inc., Toledo, is an Ohio corporation which resides in and does business in Lucas County, Ohio. To the best of plaintiff's knowledge and to the best of its attorneys' knowledge, the last known Lucas County address of said defendant was and is 302 South Byrne Road, Toledo, Ohio 43615. Said defendant's statutory agent is C. T. Corporation System, 1036 Union Commerce Building, Cleveland, Ohio 44115.

3. D. H. Overmyer Co., Inc., Louisville, is a Kentucky corporation. To the best of plaintiff's knowledge and to the best of its attorney's knowledge, the last known address of said defendant's principal office was and is 201 East 42 Street, New York, New York 10017. Said defendant's statutory agent is C. T. Corporation System, Kentucky Home Life Building, Louisville, Kentucky 40202.

4. On June 1, 1967, defendants, acting through duly authorized officers, executed and delivered to plaintiff a promissory note containing a warrant of attorney (here-

after the said promissory note is called the "Note") pursuant to which the defendants jointly and severally promised to pay to the order of plaintiff in twenty-one (21) equal monthly installments the principal sum of One Hundred Thirty Thousand Nine Hundred Seventy-seven Dollars (\$130,977.00) plus interest thereon at the rate of 6% per year on an add-on basis, said interest to commence on June 1, 1967. A true copy of the Note is attached hereto, is designated Exhibit A, and is made a part of this Petition.

5. On May 1, 1968, defendants failed to pay to plaintiff the monthly installment payment required by the Note, and said failure to pay the monthly installment payments required by the Note has continued to this date.

6. By reason of defendants' failure as described in the immediately preceding paragraph, plaintiff, acting in accordance with the terms of the Note, hereby elects to and does hereby declare the entire remaining unpaid principal of the Note, namely, Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00), together with all interest thereon, immediately due and payable, presentment, demand, notice and protest having been duly waived by the defendants.

WHEREFORE, plaintiff prays for judgment against the defendants for the sum of Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00) with interest thereon at the rate set forth in the Note from the 1st day of May, 1968, until the Note is paid in full, and for costs of suit.

SHUMAKER, LOOP & KENDRICK

By /s/ ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.

Attorneys for Plaintiff

Suite 500—811 Madison Avenue
Toledo, Ohio 43624
Phone 241-4201

STATE OF OHIO }
 COUNTY OF LUCAS } ss:

Robert A. Jefferies, Jr., being duly sworn, says that he is the duly authorized attorney for said plaintiff; that the foregoing petition is founded upon an instrument in writing for the payment of money; that said instrument in writing is in his possession; and that he verily believes the statements contained in the foregoing instrument are true.

ROBERT A. JEFFERIES, JR.
 Robert A. Jefferies, Jr.

Sworn to before me by said Robert A. Jefferies, Jr., and by him subscribed in my presence this 12th day of July, 1968.

JOYCE A. KWIATKOWSKI
Notary Public

Joyce A. Kwiatkowski
 Notary Public, Lucas County,
 Ohio
 My Commission Expires 11-14-71

Exhibit A

INSTALLMENT NOTE

Amount: \$130,977.00

New York, New York
 June 1, 1967

For value received, the undersigned, jointly and severally, promise to pay to the order of Frick Company, a Pennsylvania corporation, at its office in Waynesboro, Pennsylvania, 17268, the sum of One hundred thirty-thousand nine hundred seventy-seven dollars (\$130,977.00) in twenty-one (21) equal monthly installments of six thousand eight hundred and ninety-one dollars and eighty-five cents (\$6,891.85) which installments include interest at the

rate of six (6) per cent per annum on an add-on basis commencing June 1, 1967.

The first installment shall be payable June 1, 1967, and the remaining installments on the same date of each successive month thereafter, until this Note has been paid in full.

The Makers or any of them may, at their option, make prepayments on the principal amount of this Note without penalty; together with interest accrued to the date thereof. Prepayments shall be applied to the installments of principal due on this Note in the order of maturity.

The undersigned hereby waive presentment, demand, notice and protest of this Note.

The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or if its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default continues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days.

The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for a period of fifteen (15) days.

Payee agrees to remove any Mechanic's Lien or liens filed by the Payee against any property of the undersigned

including three Affidavits of Lien which were filed on behalf of Frick Company in respect to its claim of \$194,031.00 and which were recorded by the Recorder of Lucas County, Ohio as follows:

No. 501285, Volume of Lien Records 46, Page 468,
No. 501831, Volume of Lien Records 46, Page 520, and
No. 502867, Volume of Lien Records 46, Page 542.

D. H. OVERMYER Co., INC.
(a Kentucky corporation)

D. H. OVERMYER
D. H. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive
Officer

D. H. OVERMYER Co., INC.
(an Ohio corporation)

SHIRLEY C. OVERMYER
Shirley C. Overmyer

By D. H. OVERMYER
Chairman & Chief Executive
Officer

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

**Appearance of Attorney for Defendants and Confession
of Judgment**

By virtue of the warrant of attorney contained in a certain promissory note annexed to this Answer and the petition filed herein by plaintiff, I, an attorney at law in the several courts of record of this State, do hereby enter an appearance for the above-named defendants who executed said promissory note and said warrant of attorney and who waive the issuing and service of process therein, and I do hereby confess a judgment in favor of said plaintiff,

against said defendants, on said promissory note for the sum of Sixty-Two Thousand Three Hundred Seventy Dollars (\$62,370.00), being the amount appearing due for the principal of said promissory note, plus interest thereon at the rate set forth in said promissory note from May 1, 1968, and also for costs of suit, taxed and to be taxed.

J. RONALL BOWMAN
Attorney for Defendants
 402 Lof Bldg.
 Toledo, Ohio
 Phone No. 243-5227.

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Judgment Entry

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This day came Frick Company, plaintiff, by its attorney, Robert A. Jefferies, Jr.; also appeared in open court, for and on behalf of D. H. Overmyer Co., Inc., an Ohio corporation, one defendant herein, and D. H. Overmyer Co., Inc.; a Kentucky corporation, the other defendant herein, J. Ronald Bowman, an attorney at law of this court, and by virtue of a warrant of attorney annexed to the promissory note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said promissory note against said defendant herein, J. Ronall Bowman, an attorney at law of this Three Hundred Seventy Dollars (\$62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note, and for costs of suit taxed and to be taxed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

(1) Plaintiff recover from D. H. Overmyer Co., Inc., an Ohio corporation, one of the defendants herein, the follow-

ing sum (hereafter said sum is called the "Judgment Sum"):

Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note (6% add-on interest computed over a 21-month period on a base sum of \$130,977.00 or the equivalent of the said 6% add-on interest) together with costs herein expended, taxed and to be taxed; or

(2) Plaintiff recover from D. H. Overmyer Co., Inc., a Kentucky corporation, one of the defendants herein, an amount equal to the Judgment Sum or

(3) Plaintiff recover from each of the defendants such sums which, when totaled, will equal but not exceed the Judgment Sum.

/s/ NICHOLAS J. WALINISKI
Judge

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Notice of Judgment on Cognovit Note

Case No. 204697

To D. H. Overmyer Co., Inc., Defendant:

This is to inform you that a Judgment in the amount of \$62,370 plus interest at the rate decreed in the Judgment Entry has been entered against you on a Cognovit Note in the above-captioned case in the Common Pleas Court of Lucas County, Ohio, on July 12, 1968. This notice is sent to you in compliance with Sec. 2323.13 (c) of the Ohio Revised Code.

LUCAS COUNTY COMMON PLEAS COURT

ROBERT KOPF, CLERK OF COURT

By /s/ BEULAH R. LONG
Deputy Clerk

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion for New Trial

Now come the defendants and move the court to vacate the judgment rendered on July 12, 1968, and for a new trial for the following causes which materially affect the substantial rights of defendants, to-wit:

1. Irregularity in the proceedings of the prevailing party and of the court by which defendants were prevented from having a fair trial.
2. The judgment is not sustained by sufficient evidence and is contrary to law.
3. Newly discovered evidence, material for the defendants, which with reasonable diligence they could not have discovered and produced at the trial.

And for other errors manifest from the face of the record.

/s/ BUGBEE & CONKLE

*Attorneys for Defendants***CERTIFICATE OF SERVICE**

(Omitted)

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Affidavit

Joseph W. Westmeyer, Jr., being duly sworn, says that he is the attorney for the applicants for a new trial herein on the grounds of newly discovered evidence.

Affiant says that the judgment herein was entered by virtue of a warrant of attorney without notice to these defendants; that the consideration for the note upon which judgment was entered was the contract price agreed to be paid for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; and that because defendants had no notice of the entry of the court's judgment herein they could not with reasonable diligence have produced such material evidence prior to the court's entry of judgment.

JOSEPH W. WESTMEYER, JR.
Joseph W. Westmeyer, Jr.

Sworn to before me and subscribed in my presence this 22nd day of July, 1968.

ALLAN J. CONKLE
Notary Public,
Lucas County, Ohio

Allan J. Conkle, Notary Public
State of Ohio—Attorney-at-Law
Unexpiring Commission
O. R. C. Sec. 14703

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion To Vacate Judgment Rendered on Warrant of Attorney

Defendants respectfully move the court to vacate and set aside the judgment entered against them herein on the

12th day of July, 1968 during the present term of court, said judgment having been entered by virtue of a warrant of attorney without notice to these defendants.

Defendants say that they have a good defense to this action and the note on which judgment was rendered, as shown by their answer submitted herewith, which they request leave to file herein.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Answer of Defendants and Cross Petition of Defendant. D. H. Overmyer Co., Inc., an Ohio Corporation

• • • • •
1. For answer to plaintiff's petition, defendants deny each, all and singular the allegations of said petition not hereinafter admitted to be true.

2. Defendant, D. H. Overmyer Co., Inc., an Ohio corporation, hereinafter called "Overmyer", on or prior to February 11, 1966, employed Nixon Construction Co., Inc., as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

3. On or about the 11th day of February, 1966, Nixon Construction Co., Inc., and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part

hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

4. Defendants say that the promissory note referred to in plaintiff's petition was executed as and for, a part of the purchase price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) for a complete automatic refrigeration system furnished and installed by plaintiff pursuant to the contract in the cold storage warehouse being constructed for and proposed to be operated by Overmyer.

5. The said refrigeration system was not furnished and installed in accordance with the contract of purchase, in that plaintiff supplied materials, equipment and machinery of poor quality and design and negligently installed the same in an unworkmanlike manner; and Overmyer was required to, and did, engage other contractors to repair defects therein which resulted from the negligent work, design and defective materials.

6. The said refrigeration system was to have been a completely autonomous and automatic refrigeration system, but because plaintiff failed to comply with the contract, and because the said system was negligently installed by plaintiff, the system did not operate automatically. Overmyer was required to, and did, employ personnel to tend, maintain and control the system at all times.

7. The contract provided that said refrigeration system was to have been completed and ready for final acceptance on August 15, 1966, whereas plaintiff did not actually complete the installation until March 17, 1967. Overmyer sustained lost profits because it was not able to operate the cold storage warehouse during the seven month period between the date provided for completion of the warehouse in the contract and the actual date of completion.

8. The refrigeration system installed by plaintiff was guaranteed and warranted by it to be free from defects

in material and workmanship and to hold a temperature of minus 10° F. to within the limits of standard temperature controls, but, as installed, the said system was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

9. Because of the facts set forth in paragraphs numbered 5 through 8 above, Overmyer's expenses and losses exceeded the balance which plaintiff claims to be due on the note, and there was a failure of consideration for said note.

CROSS PETITION

First Cause of Action

10. For its cross petition against plaintiff, Overmyer incorporates all of the allegations of the foregoing answer as fully as though repeated herein.

11. Overmyer says that prior to February 11, 1966, it employed Nixon Construction Co., Inc. as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

12. On or about the 11th day of February, 1966, Nixon Construction Co., Inc. and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmeyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

13. Overmyer has duly performed all the conditions of the contract on its part.

14. Plaintiff breached the contract in that it performed its services in an incompetent, negligent and unworkmanlike manner, and in that it supplied materials, equipment and machinery of such poor design and quality that the refrigeration system furnished by plaintiff would not operate as represented by plaintiff and Overmyer was required and compelled to engage, and did, in fact, engage, other contractors to repair the defects existing in the refrigeration system; which defects existed solely because of the negligent work, design, and defective materials, equipment and machinery supplied by plaintiff.

15. By reason of the facts set forth in the first cause of action Overmyer has been damaged in the sum of Twenty-six Thousand Eight Hundred Dollars (\$26,800.00).

Second Cause of Action

16. For its second cause of action, Overmyer incorporates each, all and singular the allegations contained in its first cause of action and further says that the machinery, equipment and materials designed, fabricated and supplied by plaintiff were to have constituted a completely autonomous and automatic refrigeration system.

17. Because of plaintiff's incompetent, negligent and unsatisfactory design and workmanship, and because plaintiff designed, fabricated and/or supplied machinery, equipment and materials unsuitable and inadequate to meet the demands of the system, and because of plaintiff's breach of the contract, as aforesaid, the automatic refrigeration system, or integral and essential parts thereof, repeatedly broke down and became inoperative and failed to operate automatically and Overmyer was compelled and required to, and did, in fact, hire, engage and employ additional qualified personnel to tend, maintain and control the system at all times.

18. By reason of the facts set forth in the second cause of action Overmyer has been damaged in the sum of Nine Thousand Dollars (\$9,000.00).

Third Cause of Action

19. For its third cause of action, Overmyer incorporates each, all and singular the allegations contained in its first and second causes of action and further says that in and by the contract, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said contract, and a part of the consideration for which plaintiff was paid the price set forth therein.

20. Plaintiff entered upon the performance of the work under said contract, but wholly and totally failed and neglected to complete the said work in the time specified in the contract for the completion thereof.

21. By reason of plaintiff's failure to complete the said work within the time specified in the contract, Overmyer was unable to have the construction of the cold storage warehouse completed, to take possession thereof, and to have the same occupied as a public cold storage warehouse, and Overmyer lost the use of such completed warehouse for approximately seven (7) months.

22. By reason of the facts set forth in the third cause of action, Overmyer has been damaged in the sum of Fifty Thousand Five Hundred Dollars (\$50,500.00).

Fourth Cause of Action

23. For its fourth cause of action, Overmyer incorporates each, all and singular the allegations contained in its first, second and third causes of action and further says that, among other things, plaintiff guaranteed and warranted that, for a period as set forth in said contract, the

machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10° F. to within the limits of standard temperature controls.

24. The said refrigeration system installed by plaintiff was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

25. Within the period set forth in the contract, and upon ascertaining that the said equipment was defective and inadequate, Overmyer demanded of plaintiff that it make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and plaintiff wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

26. Upon the failure, neglect and refusal of plaintiff to complete the aforesaid contract and warranty, Overmyer was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

27. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while Overmyer was ignorant of such facts, it paid to plaintiff the sum of Two Hundred Twenty-three Thousand and Six Dollars (\$223,006.00), the total amount which it was required to pay to plaintiff under the aforesaid contract, in the form of cash and installment note.

28. By reason of the foregoing facts, Overmyer has been damaged in the sum of Eighty-six Thousand Three Hundred Dollars (\$86,300.00).

WHEREFORE, defendants pray that plaintiff's cause of action be dismissed, and that judgment be rendered for

defendant, Overmyer, against plaintiff in the sum of Eighty-six Thousand Three Hundred Dollars (\$86,300.00), plus interest and for their costs herein expended:

BUGBEE & CONKLE

By /s/ ALLAN J. CONKLE

Allan J. Conkle

Attorneys for Defendants

2001 Toledo Trust Building

Toledo, Ohio 43604

Phone: 244-6788

STATE OF NEW YORK
COUNTY OF NEW YORK

} ss:

G. R. Silcox says he is Vice-President for D. H. Overmyer Co., Inc., and Ohio corporation, and for D. H. Overmyer Co., Inc., a Kentucky corporation, and is duly authorized in the premises, and that the statements and averments contained in the foregoing answer and cross petition are true as he verily believes.

G. R. SILCOX

Sworn to before me and subscribed in my presence, this 31st day of July 1968.

GERALD N. GOLDBERG

Notary Public

Gerald N. Goldberg

Notary Public, State of New York

No. 31-6558320

Qualified in New York County

Commission Expires March 30, 1970

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Journal Entry

• • • • •
This day this cause came on to be heard on the motions of the defendants to Stay Execution, for a New Trial and to Vacate Judgment and a demurrer to the petition and the same were submitted on the record, supporting memoranda, affidavits, exhibits and arguments of counsel.

Upon consideration thereof, and being fully advised in the premises the court finds that the Motion to Stay Execution, the Motion for a New Trial and the Motion to Vacate are not well taken. The court further finds that the demurrer is not well taken.

It is therefore, ORDERED, ADJUDGED and DECREED that the defendants' Motion to Stay Execution is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion for a New Trial is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion to Vacate Judgment is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' demurrer to the petition be overruled.

It is further ORDERED, ADJUDGED and DECREED that the Motion and Affidavit for examination of the debtors in aid of execution filed in this court on July 17, 1968, be in full force and effect and that any duly authorized officers of said corporations appear before this court at 10 AM on the 16th day of December, 1968 in courtroom # 3 and answer concerning all their assets including those items listed in the Motion and Affidavit filed in this court on July 17, 1968.

To so much of this order as is adverse to the interests of the defendants they object and except.

JOHN J. CONNORS, J.
Common Pleas Judge

Approved:

SHUMAKER, LOOP and KENDRICK
Shumaker, Loop and Kendrick
Attorneys for Plaintiff

BUGBEE and CONKLE
Bugbee and Conkle
Attorneys for Defendants

Approved as to Form Only

Court of Appeals: Assignment of Error, No. 2

"It is a denial of Appellants' rights to due process under the State and Federal Constitutions to be denied an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term."

IN THE COURT OF APPEALS, LUCAS COUNTY, OHIO

CA No. 6552

Journal Entry

• • • • •

This cause came on to be heard on appeal on questions of law from the judgment of the Common Pleas Court, Lucas County, Ohio; and the same was submitted to this Court on the original papers, the record, the Bill of Exceptions, the Affidavits and Exhibits presented in the Common Pleas Court and arguments of counsel.

The Court, being fully advised in the premises, finds that the trial Court, with no abuse of discretion, properly overruled the defendants-appellants motion to vacate the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Common Pleas Court of Lucas County, Ohio, is affirmed at costs of the defendant-appellants; and the cause is remanded to that Court for execution of judgment.

To all of which defendants-appellants except.

CLIFFORD F. BROWN

*Judge of the Court of Appeals,
Presiding*

HARVEY G. STRAUB

Judge

JOHN W. POTTER

Judge

Filed

Court of Appeals

Sep. 22, 1969

Approved:

BUGBEE & CONKLE

Bugbee & Conkle

Attorneys for Defendants-Appellants

SHUMAKER, LOOP & KENDRICK

JAMES M. TUSCHMAN

Attorneys for Plaintiff-Appellee

Ohio Supreme Court, Transcript of Record, p. III

Proposition of Law No. 5:

It is a violation of the right of trial by jury provided by Section 5, Article I, of the Ohio Constitution and of the right to due process of law provided by the Four-

teenth Amendment to the United States Constitution
 for a trial court to deny a jury trial to the maker of
 a note who tenders a validly stated defense against
 the original holder thereof who has taken a judgment
 on a warrant of attorney when the trial court refuses
 to take evidence on the merits of the defense before
 deciding whether to vacate the judgment.

Authorities cited in support of Proposition of Law
 No. 5:

Fourteenth Amendment to the United States Constitution

• • • • •
Sniadach v. Family Finance Corporation of Bay View,
 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820, 37 Law
 week 4520 (1969)

The Supreme Court of the State of Ohio

1969 Term, To Wit: December 17, 1969 No. 69-720

**JOURNAL 49, Page 677 APPEAL FROM THE COURT OF APPEALS
 FOR LUCAS COUNTY**

This cause, here on appeal as of right from the Court of
 Appeals for Lucas County, was heard in the manner pre-
 scribed by law, and, no motion to dismiss such appeal hav-
 ing been filed, the Court sua sponte dismisses the appeal
 for the reason that no substantial constitutional question
 exists herein.

It is further ordered that the appellee recover from the
 appellant its cost herein expended; that a mandate be sent
 to the Common Pleas Court to carry this judgment into
 execution; and that a copy of this entry be certified to the
 Clerk of the Court of Appeals for Lucas County for entry.

Ohio Revised Code

Section 2323.13 Warrant of attorney to confess.

“(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

“(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

“(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition.”